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Race as a Hiring/Casting Criterion: If Laurence Olivier was Rejected for the Role of Othello in *Othello*, Would He Have a Valid Title VII Claim?

by
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Introduction

Experts predict that by the latter part of the 21st Century, descendants of white Europeans will fall into minority status in the United States.[1] The resulting breadth of ethnic diversity in the United States is likely to permeate (although it does to a certain degree today as well) all facets of social and political arenas, including health care, education, welfare, and so on. Likewise, one might assume the contents of mainstream media—live theater, movies, and especially television, will follow suit and begin to accurately portray the diverse population of "Americans."

Some may argue this process has already begun with the proliferation and success of "black" family television programs such as *The Cosby Show*, *Living Single* and *Family Matters*. Movies such as *Soul Food, The Joy Luck Club* and *Mi Familia,* with casts that are almost entirely of one ethnicity, are also broadening the scope of content in mass media. In addition, the casting of non-white characters in television programs is more prevalent today. Examples include Ming-Na Wen, an Asian American, in *The Single Guy*, and the emergence of "multicultural" casts on prime time television shows such as *ER* and *NYPD Blue*.

Still, arguably, there is an insufficient number of minorities in film and television and the current minority representation fails to accurately reflect the diversity of contemporary society. Furthermore, many of these existing roles are a result of typecasting and perpetuate the transmission of negative images and stereotypes to the audience.[2] Since the media are a very influential socializing factor, especially when the audience is comprised of children, there is a need for a broad range of positive role models on television and in major motion pictures. Arguably, producers and directors will not spend their talents and resources to create a product which does not have a potentially large audience. Still, if the prediction regarding the future population in the United States is correct, this argument likely fails.

In addition to the social implications of not accurately reflecting America's diversity in the media, there are significant legal

1. *America's Immigrant Challenge*, TIME SPECIAL ISSUE, Fall 1993, at 3, 5.

2. *See, e.g.*, Michael Omi, *In Living Color: Race and American Cultures*, *in* CULTURAL POLITICS IN CONTEMPORARY AMERICA 111 (Ian Angus & Sut Jhally eds., 1989). Omi suggests that popular culture, especially visual media, is saturated with stereotypical images of minorities and that these stereotypes "provide a framework of symbols, concepts, and images through which we understand, interpret, and represent aspects of our 'racial' existence." *Id.* at 114.

implications regarding the employment of minority actors and actresses. Specifically, do non-white actors and actresses encounter racial discrimination during the hiring and casting process? If so, what avenues exist to provide these actors with an appropriate legal remedy? Assuming that a legal action is viable, what defenses might the artist or casting director have? Historically, the performing arts and the entertainment industry seem to be somewhat immune from the application of the law regarding employment discrimination based on race. There is no specific case law that directly addresses this area.[3] Perhaps the expressive nature of the arts dictate the entertainment industry as a forum that should best be left to regulate itself. Still, there is a significant economic aspect which affects the livelihood of aspiring actors and actresses that may warrant some sort of governmental regulation, or at least some viable legal relief, where one feels she was unjustly denied an employment opportunity. Of course, any attempt to regulate media, art, or "expressions" runs up against the First Amendment[4] rights of the artist. In her article, Jennifer Sheppard comments on the relationship between the "lack of employment opportunities for minority actors" and "[producers'] legitimate exercise of business judgment and artistic freedom."[5] This tension has resulted in several casting controversies, especially where the script calls for a race-specific character.[6]

This note discusses whether an actor or actress has a cause of action against casting directors and/or producers under Title VII of the 1964 Civil Rights Act[7] for employment discrimination based on race. I analyze what constitutes a violation of the Act and the procedural requirements a plaintiff must comply with in order to establish a prima facie case of discrimination. Next, this note addresses how the law does not effectively deal with this issue and how this inapplicability of the law affects employment opportunities for minority actors and actresses.

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3. *See* Jennifer L. Sheppard, *Theatrical Casting—Discrimination or Artistic Freedom?*, 15 COLUM.-VLA J.L. & ARTS 267, 279 (1991).

4. The First Amendment of the United States Constitution states in pertinent part: "Congress shall make no law abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

5. Sheppard, *supra* note 3, at 271.

6. For a thorough discussion of the controversy resulting from casting of Jonathan Pryce in the role of a Eurasian character, see Mabel Ng, Note, *Miss Saigon: Casting for Equality on an Unequal Stage*, 14 HASTINGS COMM/ENT L.J. 451 (1992).

7. 42 U.S.C. §§ 2000e-2000e-17 (1994) [hereinafter the 1964 Act].

Moreover, even if legal action was plausible under the current law, I assert that there are certain practical obstacles as a result of being an "employee" in the entertainment business, that may make it more difficult, if not impossible, for an actor to carry out a charge of discrimination. Finally, I propose that currently, the only appropriate remedy is a non-legal one which requires a collaborative effort from those who are closely involved in the industry—producers, directors, actors and actresses, and the audience. I argue that government should be excluded from this collaborative solution because of the unique nature of the industry, even given the potential for discrimination.

I
Background: Casting Directors' Prerogatives Versus Actors' Right to Equal Opportunity for Employment

A problem arises in the midst of increasing concern and controversy in the entertainment industry over certain casting choices directors make, particularly when the character calls for a specific racial or ethnic background. Historically, white male actors performed the majority of roles in theater, as well as on film.[8] Arguably, at the birth and early stages of United States television and film industries, white males dominated the scene due to the lack of minorities and women who sought acting as a profession. This argument, of course, is no longer valid today since those who attempt to succeed in the entertainment industry constitute a diverse group of individuals reflecting the growing diversity of the general United States population.[9]

Consequently, in a field as competitive as acting, potential employment opportunities may be rare and even non-existent for the aspiring actor or actress. Directors take many factors into

8. Ng, *supra* note 6, at 453 (citing Stephanie Gutman & Phil West, *Casting Call Still a Whisper Hiring*, L.A. TIMES, Aug. 16, 1990, at 1).

9. Non-white ethnic groups in the 1990 census made up 28.7% of the United States population. *1990 US Census Data* (visited Feb. 9, 1998) <http://venus.census.gov/cdrom/lookup/887052057>. However, according to the Screen Actors Guild ("SAG") employment statistics for 1996, only 19% of SAG film and television jobs went to non-white SAG actors. S.F. ACTOR, Winter 1997, at 3. Underscoring this discrepancy, SAG president Richard Masur commented that, "a look at our ethnicity, gender and age-related employment statistics for the last five years indicates that the entertainment industry is not yet utilizing the broad spectrum of available SAG talent." *Id. See also Fairness in the Media Fact Sheet*, IN MOTION MAG. (visited Mar. 3, 1998) <http://www.inmotionmagazine.com/browse/publish/rainbow1.html>.

consideration when making casting decisions.[10] Since casting decisions are predominantly based on subjective criteria, a rejected actor may claim he was not chosen because of his race, irrespective of his ability to act, and therefore bring a discrimination claim against the casting director. The director may rebut this claim by asserting that race was not a consideration and her decision was based on other criteria. Alternatively, the director may admit race was a factor, but that there is a valid reason for considering race such as having an accurate portrayal of the character.

Title VII of the 1964 Act attempted to address this tension between employer prerogatives and the employees' right to fair employment opportunities.[11] In addition to the legislative history, the plain language of the statute indicates its purpose was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[12] However, Congress has made clear that it did not intend by Title VII to "guarantee a job to every person regardless of qualifications."[13]

Case law interpreting Title VII established two standards to balance the competing interests of the employer and the employee: 1) the disparate treatment theory; and 2) the adverse impact theory. Subsequent case law established the structure for necessary proof and procedure under these two theories. However, it is unclear whether Congress intended Title VII to cover the employment of actors and actresses. Indeed it is questionable whether the performing arts constitute employment at all. Even if the arts fall under the umbrella of employment, tremendous practical barriers seem to preclude an actor from bringing a successful Title VII action. Additionally, subjecting directors to Title VII requirements when making casting decisions raises a potential violation of First Amendment rights.

10. *Casting Questions: Connery Too Old? Sofia Coppola Bum-Rapped?*, L.A. TIMES, Jan. 20, 1991, at 107 (letter to the editor); Nancy Randle, *Star Makers/Casting Directors: Behind-Scene Heroes*, S.F. CHRON., July 25, 1993, at C2.

11. *See, e.g.*, Senate Voting Record No. 61, 88th Cong. 2 (1964), *reprinted in* CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT, 1945-1968, VOL. 13, *Securing the Enactment of Civil Rights Legislation*, at 146-48 (Michal R. Belknap ed., 1991).

12. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

13. *Id.* at 430.

II
Analysis

Congress' passage of the 1964 Act signified the growing intolerance of, and attempt to do away with, racial prejudice and discrimination in the United States. One area of society Congress targeted was the workplace. "In order to address the pervasive problems of employment discrimination, Congress enacted a series of statutes that deal with various aspects of the phenomenon."[14] These statutes include Title VII of the Civil Rights Act of 1964,[15] the Equal Pay Act of 1963,[16] the Age Discrimination in Employment Act of 1967,[17] the Rehabilitation Act of 1973[18] and the Americans with Disabilities Act of 1990.[19] Title VII broadly proscribes discrimination in employment on the basis of race, color, religion, sex, or national origin. Specifically, it mandates that:

> It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[20]

Subsequent cases have laid out the framework for two types of race discrimination in employment that violate Title VII. The first is a disparate treatment action, where the plaintiff alleges the employer committed a discriminatory act against a particular individual, the plaintiff.[21] Second is the adverse impact action, where the plaintiff alleges an employer's practice or policy results in systemic discrimination against a class of persons.[22] For the reasons discussed below, I posit neither theory is a viable avenue for relief for minority actors and actresses.

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14. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 91 (3d ed. 1994).

15. 42 U.S.C. §§ 2000e-2000e-17 (1994).

16. 29 U.S.C. § 206(d) (1994).

17. 29 U.S.C. §§ 621-634 (1994).

18. 29 U.S.C. §§ 791-794 (1994).

19. 42 U.S.C. §§ 12101-12213 (1994).

20. 42 U.S.C. § 2000e-2(a)(1) (1994).

21. *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Patterson v. McLean Credit Union, 491 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

22. *See generally Griggs*, 401 U.S. at 424; Dothard v. Rawlinson, 433 U.S. 321 (1977); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Connecticut v. Teal, 457 U.S. 440 (1982); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

A. Which Test is Applicable?

Under the disparate treatment model, allegations of discrimination arise where the employer treats the plaintiff-employee differently because of the employee's race.[23] This model focuses on the employer's intent.[24] An example of direct evidence of disparate treatment based on gender would be where an employer fails to hire a female applicant and being male is not an essential element of the position, while simultaneously commenting that "no woman should be named to a B scheduled job."[25] This is a clear case of gender discrimination. The more ambiguous (and consequently the more difficult to prove) cases arise where the discrimination is less overt. Although the plaintiff does not have to prove there was an expression of intent on the employer's part, she needs to present circumstantial evidence to establish a prima facie case of discrimination.[26]

1. Prima Facie Case and Burden of Proof in a DisparateTreatment Case

In a Title VII cause of action based on the disparate treatment theory, absent direct evidence of discrimination, the plaintiff must present enough circumstantial evidence to create an inference of discrimination.[27] Ultimately, the plaintiff must establish by a preponderance of evidence that the employer discriminated against the plaintiff by showing it is more likely than not that racial discrimination motivated the employer's conduct.[28]

The Supreme Court, in *McDonnell Douglas Corp. v. Green*,[29] established the basic framework for a disparate treatment case.[30] First, the employer is under no obligation whatsoever to respond until the plaintiff has made out a prima facie case of discrimination.[31] In order to establish a prima facie case of discrimination, the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that,

23. *See McDonnell*, 411 U.S. at 802.

24. *See id.*

25. Burns v. Gadsden State Community College, 908 F.2d 1512, 1515 (11th Cir. 1990).

26. MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 70 (3d ed. 1992).

27. *McDonnell*, 411 U.S. at 802.

28. PLAYER, *supra* note 26, at 71, 77.

29. 411 U.S. 792 (1973).

30. *Id.*

31. *Id.* at 802-03.

> after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[32]

However, since facts may vary in Title VII cases, the "specification above of the prima facie proof required from respondent [sic] is not necessarily applicable in every respect to differing factual situations."[33] Establishing a prima facie case functions to exclude the two most obvious explanations for the employer's actions: the plaintiff employee's lack of qualifications or the defendant employer's lack of available positions.[34] When a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption that the discriminatory act occurred is created.[35] In order to avoid a directed verdict in favor of the plaintiff, the defendant-employer must articulate some reason for the employee's rejection.[36] Once the employer does this, the presumption disappears, and the burden of proof shifts once again to the plaintiff to show the asserted reason is actually a pretext for the discriminatory act.[37] However, the burden of persuasion always remains with the plaintiff.[38]

Given the nature of the entertainment industry, it seems doubtful that a minority actor would be successful in bringing an action under Title VII if he relied on the disparate treatment model. Generally, the threshold the plaintiff employee is required to meet in order to establish a prima facie case of disparate treatment is low and consequently easy to meet.[39] In the context of employment of actors and actresses, however, certain circumstances may make a showing of a prima facie case more difficult to establish. Specifically, the second element of the prima facie case, which requires a showing that the plaintiff was "qualified," may be difficult to establish because of the extremely subjective nature of hiring and casting.[40] Moreover, the intense competition for the leading roles may deter an actor from even

32. *Id.* at 802.

33. *Id.* at 802 n.13.

34. Adjunct Professor Brad Seligman, Lecture for Employment Discrimination at Hastings College of the Law (Jan. 16, 1997).

35. *See Burdine*, 450 U.S. at 254.

36. *Id.* at 255.

37. *Id.* at 256.

38. *Id.*

39. Adjunct Professor Brad Seligman, Lecture for Employment Discrimination at Hastings College of the Law (Jan. 27, 1997).

40. Gregory J. Peterson, *The Rockettes: Out of Step with the Times? An Inquiry into the Legality of Racial Discrimination in the Performing Arts*, 9 COLUM.-VLA J.L. & ARTS 351, 356 (1985).

filing a complaint for fear of being labeled a troublemaker amongst the decision makers of the entertainment industry.[41] As discussed below,[42] even if the plaintiff-actress establishes a prima facie case of discrimination, the defendant-employer may assert the defense of a bona fide occupational qualification ("BFOQ").

2. Adverse Impact Theory

Unlike the disparate treatment theory of discrimination, the adverse impact theory of employer liability does not depend upon the employer's intent.[43] Instead, one looks at the impact of a particular company policy or practice (such as an educational requirement) upon a protected class.[44] Thus, "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[45] If the court finds that an employer policy or practice causes an adverse or disproportionate impact on a certain protected minority class, absent a showing that the requirement is a result of a business necessity, the plaintiff will prevail.[46] This theory requires the employer to prove that the challenged policy is justified because it is job related *and* necessary.[47]

In *Griggs v. Duke Power*, the Court stated that employment practices with a disparate impact are prohibited if they "cannot be shown to be related to job performance"[48] or are "unrelated to measuring job capability."[49] For example, the Equal Employment Opportunity Commission ("EEOC") has issued guidelines to permit only the use of job-related tests.[50] The Court has held an

41. *Id.*
42. *See infra* Part II.B.2.
43. *Griggs*, 401 U.S. at 429.
44. *Id.* at 431.
45. *Id.* at 430.
46. *Id.* at 431.
47. *Id. See also Dothard*, 433 U.S. 321.
48. 401 U.S. at 431.
49. *Id.* at 432.
50. *Id.* at 434 n.9. EEOC Guidelines on Employment Testing Procedures, issued on August 24, 1966, provide:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which gives the employer a chance to measure the applicant's ability to perform a particular job or class of jobs.

The EEOC position has been elaborated in the new Guidelines on Employee Selection

"administrative interpretation of the Act by the enforcing agency (here, the EEOC) is entitled to great deference."[51] The fact that the EEOC, however, has not administered any guidelines regarding casting criteria again suggests that employment practices in the performing arts were not intended to be governed by Title VII.

The adverse impact theory applies to subjective requirements, as well as objective requirements.[52] An example of an objective criterion is where the employer requires that a "candidate must be at least 5'8" tall and weigh 170 pounds."[53] Even if the employer establishes a valid business necessity defense, the plaintiff may still prevail if she can show that an "alternative employment practice" could equally serve the employer's legitimate interest and equally predicts the same outcome (such as job performance), but does not have a discriminatory effect, and the employer refuses to adopt this alternative practice.[54]

Once the plaintiff establishes a prima facie case of adverse impact discrimination, unlike in disparate treatment cases, the burden of proof shifts to the defendant employer to show that the policy was a business necessity.[55] This furthers the purpose of Title VII, which is to

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Procedures, 29 C.F.R. § 1607, 35 Fed. Reg. 12,333 (Aug. 1, 1970). These guidelines demand that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.* § 1607.4(c).

51. *Griggs*, 401 U.S. at 433-34.

52. *See Watson*, 487 U.S. 977. In *Watson*, the Court applied the adverse impact theory to subjective criteria, including requirements that the candidate be "communicative, have leadership skills, and a pleasant personality." *Id.*

53. Adjunct Professor Brad Seligman, Lecture for Employment Discrimination at Hastings College of the Law (Feb. 19, 1997). Professor Seligman stated that a specific height requirement for firefighters could be shown to have an adverse impact on certain races. Proof of such discrimination could be presented in the form of a comparison. For example, the plaintiff class may present evidence that in Japan, a country with some of the most skilled firefighters, the government employs firefighters who are generally shorter than the required height here in the United States. This comparison proves that a height requirement is neither job related nor a necessary requirement to be an effective firefighter.

54. Civil Rights Act of 1991, Title VII (1991), (codified as amended at 42 U.S.C § 2000e-2(k)(1)(A)(ii) (1991)).

55. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court stated the burden of proof does not shift to the defendant in an adverse impact case where the plaintiff establishes a prima facie case of discrimination. Instead, it always remains with the plaintiff. The Civil Rights Act of 1991, however, specifically reversed this part of the *Wards Cove* decision and re-instated the law under *Griggs*. It does so by amending Title VII to add § 703(k)(1)(A):

> An unlawful employment practice based on disparate impact is established under this title only if—

provide quality of employment opportunities by removing "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible classification."[56] Moreover, it is likely the defendant employer has more resources and better access to relevant information such as personnel files, hiring guidelines, and other records.

Because the burden shifts in adverse impact cases, a minority actress may have more success bringing a race discrimination case under this theory than under the disparate treatment theory. However, a practical problem in bringing an adverse impact case is that it is usually a class action suit and actors may not have the numerosity, resources or time to bring such an action. In filing a charge under the adverse impact theory, the actress will encounter similar difficulties regarding the problematic aspects of a disparate treatment case. Moreover, it is clear that Congress did not intend for Title VII to "guarantee a job to every person regardless of qualifications."[57]

B. Exemptions/Exceptions

1. Bona Fide Occupation Qualification

If a plaintiff succeeds in establishing a case of discrimination based on the disparate treatment theory, the defendant may avoid liability if she can establish that a certain criterion—here, "race"—is a bona fide occupational qualification. Title VII permits discrimination in hiring and employment in certain circumstances:

> Notwithstanding any other provision of this subchapter, . . . it shall not be unlawful employment practice for an employer to hire and employ . . . [an employee] on the basis of his religion, sex, or national origin in those circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

56. *Griggs*, 401 U.S. at 431.

57. *Id.* at 430.

> necessary to the normal operation of that particular business or enterprise.[58]

This provision of Title VII allows intentional or unintentional discrimination where religion, sex, or national origin is a BFOQ. In order to qualify as a BFOQ, "a job qualification must relate to the 'essence,' or to the 'central mission' of the employer's business."[59]

Moreover, the EEOC has adopted a same narrow construction of the BFOQ exception after it was assigned authority for enforcing the statute.[60] The EEOC has construed the BFOQ exception to be applicable only to job situations that require specific physical characteristics such as those necessarily possessed only by one gender.[61] For example, in *Dothard v. Rawlinson*,[62] the Court accepted gender as a valid BFOQ where the defendant employer asserted that its requirement for prison guards to be male was related to the essence of the work, because it involved the safety of inmates and others in the prison community.[63]

a. Race as a BFOQ

Even if the casting director can show that a criteria specifying a race is related to the "essence" of the work, it is evident that race can never be considered a BFOQ.[64] Since "[r]ace is conspicuously absent from the exception; the bare statute could lead one to conclude that there is no exception for either intentional or unintentional racial discrimination."[65] However, gender may be a valid BFOQ for hiring an actor or actress where it is necessary for the purposes of authenticity or genuineness of the character.[66]

b. Aesthetic Characteristics in Entertainment

Arguments based upon the aesthetic characteristics of a particular actor or actress potentially carry the greatest force. In his article discussing the homogenous racial composition of the

58. 42 U.S.C. § 2000e-2(e)(1) (1994).

59. International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991).

60. 29 C.F.R. § 1625.6 (1984).

61. *See generally* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545-46 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977).

62. 433 U.S. 321 (1977).

63. *Id.*

64. *See, e.g.*, Knight v. Nassau County Civil Serv. Comm'n, 649 F.2d 157, 162 (2d Cir. 1981).

65. Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir. 1980).

66. *See* 29 C.F.R. §§ 1604.2(a)(1)(iii), 1604.2(a)(2) (1990).

"Rockettes," Gregory Peterson proposes "[a] director or choreographer may sometimes choose a performer or an entire cast along racial lines simply because of the visual characteristics of a particular race."[67] However, Peterson goes on to argue that the purest example of an aesthetic decision would be found in an abstract work such as abstract dance where the visual component achieves a heightened level of significance.[68] Consequently, Peterson asserts "it may be doubtful whether the systematic exclusion of minority members from employment opportunities, an act contravening the policy of Title VII, can be justified by the mere aesthetic prerogatives of a stage director."[69]

c. Customer Preference

The casting director may also argue that consideration of what the audience might prefer to view when determining a cast is a valid BFOQ. This so-called customer preference would be determined by viewer response. One example of this would be where a minority actress brings charges of discrimination against the director for casting a white actress in a role which the minority actress auditioned for that calls for a minority character. The director may justify her casting choice by claiming that the white actress is more profitable because of her status as a star.[70] This potential defense arises frequently in the context of airline flight attendant employment where the airline company attempts to argue its policy to hire mostly women is based on customer preference.[71] Although the Supreme Court has never addressed this issue, the circuit courts seem consistent in ruling that customer preference is *not* a valid BFOQ and therefore cannot justify a discriminatory policy.[72] Consequently, it seems clear that a director would fail if she tried to assert customer preference as a BFOQ.

As illustrated above, establishing a BFOQ subjects the defendant to a heavy burden. This burden, along with the narrow construction of

67. Peterson, *supra* note 40, at 361.

68. *Id.* at 362.

69. *Id.*

70. Gregory Nava, *'Mi Familia:' Casting for Authenticity*, L.A. TIMES, June 4, 1995, at 14. Nava suggests Marisa Tomei, an Italian actress, was cast in *The Perez Family* because of her "star" status, not because she was the best person for the part.

71. *See generally* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982).

72. *See, e.g.*, Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994); Rucker v. Higher Ed. AIDS Bd., 669 F.2d 1179 (7th Cir. 1982); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).

what constitutes a BFOQ suggests it is a disfavored defense.[73] This conclusion is not surprising considering that such criteria, even when established as a BFOQ, goes directly against the purpose of Title VII.[74] Also, as with establishing a prima facie case of discrimination, the BFOQ defense does not seem appropriate in the context of performing arts.

2. Business Necessity

Since "[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense,"[75] an employer may raise this defense in relation to customer preference, because the casting decision was driven by the box office draw of a particular actress. However, the business necessity argument is limited to defending an adverse impact case. Another restriction is that while the legislatively created BFOQ applies to intentional and unintentional discrimination, the business necessity doctrine is apparently limited to practices which are facially neutral but discriminatory in operation.[76] However, there may be conceivable situations where a business necessity exception is warranted for intentional racial discrimination.

a. Authenticity

In *Miller v. Texas State Bd. of Barber Examiners*,[77] the Fifth Circuit suggested two situations in which it felt that the business necessity exception would be warranted even where there was intentional racial discrimination.[78] First, was "the undercover infiltration of an all-Negro criminal organization or plainclothes work in an area where a white man could not pass without notice."[79] Second, the Fifth Circuit stated in dicta that a business necessity exception may be appropriate in the casting of actors to play certain

73. MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 280 (1988). In discussing the development and history of the BFOQ, Player suggests this defense should be limited. For instance, he states that the Court "indicat[ed] that the BFOQ defense is an 'extremely narrow exception' that cannot be based upon 'stereotyped characterizations.'" *Id.* (quoting *Dothard*, 433 U.S. at 333-34). *See also* Interpretive Memorandum of Senators Clark and Case, 110 CONG. REC. 7213 (1964).

74. Adjunct Professor Brad Seligman, Lecture for Employment Discrimination at Hastings College of the Law (Feb. 20, 1997).

75. *Johnson Controls*, 499 U.S. at 198.

76. *Miller*, 615 F.2d at 653.

77. *Id.*

78. *Id.* at 653.

79. *Id.* (citing Baker v. St. Petersburg, 400 F.2d 294, 301 n.10 (5th Cir. 1968)).

roles.[80] "For example, it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr."[81] However, the Fifth Circuit declined to expand the business doctrine as discussed above.[82]

The judicially created doctrine of business necessity balances the employer's prerogatives against the employee's right to employment. In the context of casting a film about a Chicano family, a director may have a specific purpose for casting only Latinos—to transmit to the audience an accurate portrayal of the characters.[83] Arguably, authenticity in the performing arts is not determined by one's race or ethnicity.[84] The validity of "authenticity" as a business necessity may turn on the content of the film—for instance, whether it is a "romantic comedy" or a "Latino-themed" film.[85]

3. Title VII: Legislative Intent

The legislative history and discussion of Title VII indicate Congress may not have intended the provision to affect the performing arts.[86] In discussing the limited scope of Title VII, Senators Clark and Case commented that:

> [The BFOQ] exception is a limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification. Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.[87]

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80. *Id.* at 654.

81. *Id.*

82. *Id. See supra* notes 75-76 and accompanying text.

83. Nava, *supra* note 70, at 14. In an interview, film director Nava stated, "[w]ith 'My Family/Mi Familia,' I wanted to show our culture the way it is . . . my insistence in using only Latinos was one of the obstacles (in making the film), but to me it was more important not to make the movie than to make it in a ridiculous fashion."

84. *See* Elaine Dutka, *Ethnic Casting Debate Resurfaces in Hollywood Two Latino-Themed Movies Renew Questions of Box-Office Risks vs. Appropriate Portrayals*, L.A. TIMES, May 18, 1995, at 1. Meyer Gottleib, President of Samuel Goldwyn Co., discussing the casting of non-Latinos in the movie *The Perez Family* stated: "There's a profession called 'acting,' . . . Jonathan Pryce took a lot of heat, but turned in a fabulous portrayal of a Vietnam hustler in 'Miss Saigon.'" *Id.*

85. *Id.*

86. *See* 110 CONG. REC. 7213, 7217 (1964).

87. H.R. DOC. NO. 7152, 110 CONG. REC. 7213 (1964).

These examples indicate that a producer or director need not be limited by the provisions in Title VII. In fact, legislative history indicates acting was one area which might be exempt from such limitations.[88] Moreover, the Senators explained that

> [a]lthough there is no exemption in Title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro. . . . A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible.[89]

Senators Clark and Case implied in their statement that in casting for a film, a person's race or ethnicity may determine whether she is hired.[90]

C. Other Defenses

1. Artist's/Director's First Amendment Right to Freedom of Expression

The inapplicability of Title VII to the situation above suggests the issue is beyond the scope of Title VII. Furthermore, Congress' purpose of Title VII and the language in the legislative history regarding this matter suggests Congress did not intend to cover this area of "employment" with Title VII.[91] Additionally, applying Title VII to this particular context runs up against a potential First Amendment concern.

In resolving this tension, one must defer to the Constitution since it always supersedes a statute—even where, as here, the statute is intended to afford constitutional protection.[92] "The First Amendment is implicated because the production of a play [or movie] is a medium of expression for its director."[93] Since the performance may be considered a statement in which the actors are the "words" cast by the director to express that statement, the casting decision should be

88. 110 CONG. REC. at 7217.

89. *Id.*

90. Peterson, *supra* note 40, at 354.

91. *See supra* notes 86-90 and accompanying text.

92. U.S. CONST. art. VI, § 2. The Supremacy Clause of the Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

93. Sheppard, *supra* note 3, at 280.

protected as other words and types of expressive conduct are protected.[94]

Although no court has ever decided the issue of "freedom of casting"[95] in theater or film, the First Circuit, in dicta, addressed the issue in *Redgrave v. Boston Symphony Orchestra*.[96] In *Redgrave*, the First Circuit stated that "the tension between the First Amendment and civil rights laws is relevant to situations involving race-specific casting" and "stated it '[did] not think . . . that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests.'"[97]

Indeed, where the artist intends to make an assertion or expression with her work, she has the right to do so in any way she so desires, even if another person may oppose it. Thus, the right to require an actress cast as a character in a movie in which the theme focuses on race relations to be a member of a particular racial or ethnic group should be protected under the artist's First Amendment rights. As the media's focus on race relations increases, this right will become an important legal weapon for the artist who is charged with race discrimination for requiring the actor to be black, Latino, Asian, etc.[98]

Likewise, a casting director who chooses to cast a white actress in a race-specific role may invoke her First Amendment right when charged with a violation of Title VII, no matter how offensive it may be to the audience or other actors. This right would be especially important where the director has a specific expressive motive for making such a decision and intends to send a certain message with that casting decision. "If a director is forced to change his or her casting criteria because the criteria are found to violate the Civil Rights Act, the director's message will be altered."[99] However, a director's invocation of his First Amendment rights may be limited to where the racial casting is an essential element of the plot and attempts to transmit some sort of societal message to the audience.[100]

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94. *Id.*

95. *Id.*

96. 855 F.2d 888 (1st Cir. 1988).

97. Sheppard, *supra* note 3, at 280-81 (quoting Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 904 n.17 (1st Cir. 1988)). *See also* New York State Club Ass'n v. New York, 487 U.S. 1 (1988); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

98. *See, e.g.*, Don Shirley, *Theater Review: Casting's Just One Bug in 'Oleanna' Mamet Insufficiently Draws the Character in His Political Tract*, L.A. TIMES, Feb. 7, 1994, at 1.

99. Sheppard, *supra* note 3, at 281.

100. Peterson, *supra* note 40, at 361.

Moreover, a possible criticism of this type of First Amendment protection, although not grounded on legal theories, is that "the first amendment stands as a general obstruction to all progressive legislative efforts."[101] Mark Tushnet argues the First Amendment is the new "guarantor" for the privileged.[102] With the decrease in funding for public broadcasting leading to its impending demise, Tushnet's argument becomes feasible.[103]

III
Proposal: The "Players" Must Collaborate

In pursuing claims for discrimination based on race, minority actors and actresses face an apparent dearth of legal remedies. Additionally, the nature of the entertainment industry discourages one from pursuing any type of legal recourse. Thus these actors must resort to non-legal ways of stepping into mainstream media in order to portray an accurate picture of the American demographic.

A. Non-Traditional/Color-Blind Casting

Non-traditional casting—the placing of minorities, women and the disabled in roles associated with white, able-bodied male actors—is one possible solution for minority actors seeking roles.[104] The purpose of non-traditional casting is to demonstrate that "talent, not necessarily race, gender, ethnicity or physical ability should dictate casting choices."[105] Ideally, the result would be the opening up of "more jobs for ethnic and minority actors, directors, playwrights, producers and others in the theater, film and television industries."[106] However, this casting approach may in fact, result in fewer roles for minority actors and actresses where "reverse" color-blind casting occurs and a white actor is cast for a minority character.[107] Two recent examples include the casting of Jonathan Pryce, a Welsh actor, as a

101. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984).

102. *Id.*

103. This argument may be explored in future articles but is beyond the scope of this note.

104. For example, Earl Hyman, a black actor, was cast as the lead in a production of Shakespeare's "Julius Caesar." *See* Nancy Churnin, *Casting Across the Color Line Nontraditional Choices Grow, as Theaters Examine Roles*, L.A. TIMES, Jan. 13, 1989, at 1.

105. Zan Dubin, *A Demand for Nontraditional Casting*, L.A. TIMES, Oct. 13, 1988, at 1.

106. *Id.*

107. *See Color and Casting*, L.A. TIMES, Oct. 10, 1988, at 99 (letter to the editor).

Eurasian in the Broadway production of "Miss Saigon," and Richard Gere as a Japanese American in *Rhapsody in August*.[108]

Another problem with blind casting may be the audience's potential tendency to focus on the ethnicity or race of the actors. With non-traditional casting, the audience is unrealistically expected to suddenly become color blind; instead it is likely to become confused. For instance, in a play (that does not revolve around an ethnic specific theme) where a black husband and an Asian wife have a white daughter, the audience might strain to project some social statement onto the play. Likewise, where a production is "ethnic specific," and focuses around such a theme, color-blind casting would not be appropriate. Opponents of color-blind casting also argue that "such casting often flies in the face of historical reality."[109]

B. Increase Diversity of Roles to Avoid Typecasting Minority Actors

Artists and directors need to create more roles for people of color.[110] This avenue may also entail adopting the casting guidelines proposed by Actors' Equity which includes expanding the National Endowment for the Arts guidelines on *artistic* content.[111] An Equity spokesperson suggested that "minority actors deserve protected casting at every level of the commercial theater as well."[112] By the same token, producers must be willing to support the artists, writers, directors, and actors who endeavor to diversify the contents of mass media.

Directors may argue that the "pool of applicants," those who respond to casting calls is a factor in the dearth of minority actors and

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108. *See* David. J. Fox, *Gere Casting Rates Softer Protest by Asian Americans*, L.A. TIMES, Aug. 15, 1990, at 1.

109. William A. Henry, III, *Does Color Blindness Count? (Nontraditional Casting in William Shakespeare's Richard III as well as Miss Saigon)*, TIME, Aug. 27, 1990, at 67.

110. The dearth of parts for minority actors/actresses has been a consistent complaint. In 1992, the Association of Asian-Pacific-American-Artists, a watchdog and advocacy group, had to postpone its awards dinner because of the lack of contenders. *See* Terry Pristin, *A Look Inside Hollywood and the Movies. Casting Call 'Rising Sun:' There's Good News and Bad News for Asian-American Actors*, L.A. TIMES, Apr. 12, 1992, at 26. *But see infra* notes 121-123 and accompanying text.

111. Charlton Heston, *Casting-Equity Style-in the Year 1999*, L.A. TIMES, Sept. 24, 1990, at 3. Actors' Equity filed charges of discrimination in casting against Gordon Davidson and the Los Angeles Center Theatre Group after Davidson failed to respond to Equity's recommendations to revamp his casting practices to expand casting of blacks, Latinos, and Asians, particularly in leading roles. *Id.* However, since Equity's guidelines are not federal law, Davidson would not be legally liable.

112. *Id.*

actresses.[113] For example, Actors' Equity filed a grievance with the League of American Theaters and Producers against the producers of *The Will Rogers Follies*, when no minorities were cast.[114] Phillip Oesterman, associate director of the musical simply explained, "[minority dancers] just didn't come."[115] In fact, Barry Moss, the casting director for *The Will Rogers Follies*, claimed he made specific casting calls for Black dancers by contacting the Dance Theater of Harlem, the Alvin Ailey company, and other dance schools, but found that "[b]lack actors are just not coming out for the calls."[116]

C. Audience Activism and Boycotting

To compensate for the possible ineffectiveness of the remedial methods discussed above, it is imperative that the audience play an active role in this collaboration. Along with actors and directors, the audience should shoulder its social responsibility and demand that movies or television programs cast people of color and refuse to watch or frequent the showing if the director fails to do so. With the growing non-white population, this tactic is a feasible solution under certain circumstances. Although some of such attempts have failed, others have succeeded.[117] In fact, there has been one case where a movie based on Latino artists Frida Kahlo and Diego Rivera was canceled because of a casting controversy.[118]

However, audience activism is not without potential problems. First of all, the practical difficulties in organizing such activism may be a barrier. Even worse, such activism may actually be counter productive where productions portraying people of color are prevented entirely from being produced. At a minimum, the audience and activist organizations should voice their concerns regarding the

113. Alex Witchel, *'Will Rogers' Casting Drama Continues*, S.F. CHRON., Jan. 6, 1992, at E2.

114. *Id.*

115. *Id.*

116. *Id.*

117. John Colapinto, *Rated PC*, US MAG., Oct. 1993, at 43-47. In his article, Colapinto cites the futile attempts of Asian-American demonstrators to prevent audience from buying tickets for the controversial movie *The Rising Sun*. He asserts that such post-release protests are not effective and that interest groups must fight to have their concerns addressed *before* movies are completed. Colapinto mentions a successful attempt where the Arab-American Anti-Discrimination Committee lobbied Disney to change an "Aladdin" lyric which describes a fictional Arab city as a place where "they cut off your ear if they don't like your face." Disney ended up removing the reference to amputation for the film's video-cassette release. *Id.*

118. *See Valdez Halts Kahlo Film Over Casting*, S.F. CHRON., Aug. 19, 1992, at E3.

unbalanced and unrealistic portrayals of people of color in the media.[119]

D. Public Recognition

Wide spread public recognition is another vehicle that may encourage audience support and awareness of non-white actors' endeavors to step into the mainstream media. While the Academy of Motion Pictures Arts and Sciences Awards honor artists for their talent and success, "behind the glamour and the glitz, behind the fantasy of inclusion and opportunity so carefully nurtured by the film industry, there is the reality that . . . out of 150 people nominated in the top categories (producing, directing, acting, writing)," non-white artists are patently excluded.[120]

However, recognition of non-white artists is not entirely absent in the entertainment industry. "The NAACP Image Awards honor those individuals and organizations which have contributed to the positive portrayal of African Americans in motion pictures, television, literature and recording."[121] Similarly, the Golden Eagle Awards celebrate the talent and culture of Latino artists,[122] and the Golden Ring Awards highlight the achievements of Asian American and Pacific Islander members of the arts and entertainment community.[123] While such recognition alone may be insufficient to alleviate the lack of diversity in mainstream media, it may encourage decision makers in the entertainment industry to realize the abundance of non-white artists and the demand for their talent.

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119. *Casting of Asians*, L.A. TIMES, Dec. 31, 1989, at 91 (letter to the editor). Beulah Ku, Director of Advocacy Association of Asian/Pacific American Artists in Los Angeles wrote in response to the L.A. Times' article on "The King and I," which did not cast any Asians as main characters. She wrote, "[t]o use no Asians as principals is unjust and anachronistic, especially when 'The King and I' is a musical so obviously based on Asian themes." *Id.*

120. Reverend Jesse L. Jackson, *An Open Letter to the Entertainment Community*, IN MOTION MAG. (visited Mar. 3, 1998) <http://www.inmotionmagazine.com/browse/publish/rainbow2.html>.

121. *Online Conference at the 1996 NAACP Image Awards,* PEOPLE (visited Mar. 3, 1998) <http://mouth.pathfinder.com/people/interactive/naacptrans2.html>.

122. *See Award Winners 1997 Golden Eagle Awards* (visited Mar. 2, 1998) <http://www.newmediatv.net/winners.html>.

123. *See* Paul Lee Cannon, *An All Asian American Affair*, ASIANWEEK, S.F. Edition, Oct. 16-22, 1997, at 21-22.

IV
Conclusion

Hypothetically, if Laurence Olivier had been denied the role of Othello in *Othello* because he is not a black man, it seems likely that he would not have had a legal cause of action alleging race discrimination under Title VII of the Act. Current legal remedies for employees do not seem to encompass the performing arts. Practical obstacles also work against successful legal actions. Ultimately, this inability to seek adequate legal redress does not affect the "Laurence Oliviers" of the performing arts industry. However, inadequate legal remedies greatly influence the success (or failure) of aspiring, non-white actors and actresses. Consequently, those who are critically involved in the entertainment industry must be held responsible to work together to level the playing field and create equal opportunities for stardom for all people—regardless of their race or ethnicity. Given the capitalist nature of our society as well as the current sentiment regarding affirmative action, however, such collaboration seems hopeful at best. Consequently, if an actor attempts to file charges and others follow suit, Congress, not the industry, may be called upon to legislate appropriate remedies.